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No. 809

In the Supreme Court of the United States

OCTOBER TERM, 1964

PETER GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D. C., 20530.

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Petitioner, a merchant seaman, was injured in the course of his employment by the Grace Line and was admitted to the Gorgas Hospital, a public health facility for the treatment of seamen operated under the supervision of the government in the Canal Zone. In this suit under the Tort Claims Act, petitioner asserted that there had been negligence in the conduct of an operation performed on his hip and, additionally, that he had suffered further injury in a fall from a defective wheelchair supplied by the hospital.

The government filed an answer, denying negligence and asserting as an affirmative defense a general release given by petitioner to his employer.

At the trial, petitioner moved to strike the government's answer because of its alleged failure to produce for pre-trial examination the surgeon who had operated upon petitioner. This motion was denied. Thereafter, petitioner expressly abandoned his claim of surgical malpractice, for the reason that his own expert medical witness had reviewed the hospital records and concluded that "there was no malpractice in the surgical procedure that was followed * * *" (Tr. 48; p. 7b of government's brief below). The trial then proceeded on the claim relating to the fall from the wheelchair, at the conclusion of which the district court entered judgment for the United States. The court determined that petitioner had not suffered injury as a result of that fall.

In this Court, petitioner seeks review solely of the affirmance by the court of appeals of the refusal of the district court to strike the government's answer. The action of the district court was, however, clearly correct since there is no provision in the Federal Rules of Civil Procedure authorizing the relief which petitioner sought.[1] In any event, as the court of appeals pointed out (Pet. App. 2a), petitioner:

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[1] Petitioner relies upon Rule 26, which merely permits the taking of depositions. Rule 41(b) clearly is unavailable to petitioner, for it is a defendant's remedy exclusively. Rule 37(b)(2)(iii) or (d) applies only to parties and officers or managing agents of parties; it would not apply to the operating surgeon.

failed to show any prejudice caused by the absence of the operating surgeon. He had voluntarily withdrawn his claim for malpractice and had the testimony of his own medical expert both as to operative procedures and the X-rays.

We respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

January 1965.

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